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FILED
MAR 16 1960
JAMES R. BROWNING, Clerk

No. 692.

IN THE

Supreme Court of the United States

October Term, 1959.

UNITED STATES OF AMERICA,
Petitioner,

vs.

GEORGE MAX CHARLES WOLFF.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Philadelphia 2, Pa.,
Counsel for Respondent.

March, 1960.

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement	3
Reasons for Denying the Writ:	
I. The Court does not have jurisdiction	4
II. There is no conflict of decision	5
III. The decision of the Court below is correct	6
Conclusion	7
Appendix	8-10

CITATIONS

CASES:

Aure v. United States, 225 F. 2d 88	5
Bindczyck v. Finucane, 342 U. S. 76	5
Kaufteil, Petition of, 152 F. Supp. 538	5
Krausse v. U. S., 194 F. 2d 440	7
Pauschert, Petition of, 140 F. Supp. 485	5
Pinner's Petition, In re, 161 F. Supp. 337	5, 7

PAGE

Rosenbaum, Petition of, 171 F. Supp, 141 5

Tutun v. United States, 270 U. S. 568 (1926) 5

United States v. Menasche, 348 U. S. 528 ..... 5, 6

Zaharia, Petition of, 166 F. Supp. 314 5

STATUTES:

Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. 1101 et seq.:
Section 340 4
Section 405 ..... 2, 3, 5, 6

Nationality Act of 1940, 54 Stat. 1137, as amended, 8 U. S. C. (1946 ed.) 501 et seq. 2, 3, 6, 7

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OPINIONS BELOW.

The opinion of the court of appeals (App. pp. 11-16) is reported at 270 F. 2d 422. The opinion of the district court (R. 22-26) is not reported.

JURISDICTION.

The order of the district court was entered on January 13, 1959 (R. 27). Thereafter, in accordance with said order respondent took the oath of allegiance to the United States on January 16, 1959, and a naturalization certificate was issued to him (R. 11, 12, Resp. pp. 8-10). An appeal was taken to the court of appeals on March 12, 1959 (R. 28, 29) and judgment of the court of appeals was entered on September 16, 1959 (App. p. 17). Thereafter, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including February 13, 1959. The oath of allegiance having been given to the respondent and a certificate of naturalization having been issued, this Court does not presently have jurisdiction in the matter.

QUESTIONS PRESENTED.

Whether an order granting naturalization upon the taking of the oath of allegiance is no longer appealable after the said oath is taken and the respondent has renounced all allegiance and fidelity to any foreign government and has received his naturalization certificate.

Whether residence in the United States prior to the effective date of the Immigration and Nationality Act of 1952 is a status, condition, or right in process of acquisition which is preserved by the Immigration and Nationality Act of 1952, Section 405(a), 8 U. S. C. 1101, so that said person may obtain the benefits of the Nationality Act of 1940.

STATUTES INVOLVED.

The pertinent provisions of the Immigration and Nationality Act of 1940 and 1952 that are involved are set forth in the petition for a writ of certiorari on pages 2-4.

STATEMENT OF THE CASE.

The respondent, a native of Germany and a citizen of Argentina, was admitted for permanent residence in the United States in April, 1948 (R. 1). He filed his declaration of intention to become a citizen on September 17, 1948 (R. 2-5), and filed his petition for naturalization on July 16, 1958 (R. 6-11). His petition form correctly listed all of his absences from the United States (R. 8) showing that he was physically present in the United States approximately nine months in the five-year period immediately preceding his petition. During the period he was out of the United States he was employed by the Baldwin-Lima-Hamilton Corporation as a sales and service representative to Mexico and South America and all of his absences were pursuant to his employment (R. 14). He had always paid his taxes and has done everything necessary to continue his permanent residence status in the United States (R. 14-15).

Over the objections of the naturalization examiner the district court granted the petition for naturalization, stating that under the savings clause of the Immigration and Nationality Act of 1952, Section 405, his residence was sufficient to preserve his status, and, therefore, the residence requirements should be determined under the 1940 Act (R. 22-26). Thereafter, an order was entered granting the respondent's naturalization upon taking the oath of allegiance in accordance with law (R. 27).

On January 16, 1959, in accordance with the aforesaid order, respondent took the oath of allegiance to the United States and renounced all allegiance and fidelity to any foreign government (R. 11, 12), and a certificate of naturalization (No. 8105882) was issued to him on January 16, 1959 (Res. pp. 8-10).

The court of appeals rightfully affirmed the judgment of the district court on the merits and, thereafter, this petition for a writ of certiorari was filed.

REASONS FOR DENYING THE WRIT

I. THE COURT DOES NOT HAVE THE JURISDICTION TO HEAR THIS MATTER

This is an appeal from the order of the district court granting naturalization of the respondent upon taking the oath of allegiance in accordance with law. In the case at bar *Wolff*, shortly after the said order was entered, appeared before the court and was permitted to surrender his citizenship irrevocably to the country to which he owed allegiance at this time.[1] In the event that it should now be determined as a matter of law that the respondent was not entitled to United States citizenship, this would in no way effect his unequivocal renunciation of his existing right of citizenship in another country and would place him in a position of not only being stateless but of being unable to obtain any travel document to continue in his job. The Immigration and Nationality Act of 1952 quite clearly sets forth the procedure to be followed to cancel a certificate of citizenship.[2] It is questionable, as a matter of law, whether

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[1] (R. 11) where the oath states . . . "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty of whom or which I have heretofore been a subject or citizen."

[2] Immigration and Nationality Act of 1952, Sec. 340, 8 U. S. C. 1451 et seq.

the reversal of the order of the lower court by itself would give any right to cancel this certificate which has been issued to him upon the administration of the oath. The government here has not taken any of the steps or followed any of the procedure for an action of revocation of said certificate.

It is conceded that the right of appeal does exist in naturalization cases.[3] These cases are all distinguishable, however, as at no time was the question specifically before the court after the oath had been rendered at a date subsequent to the said order and the party has surrendered his foreign citizenship and has been issued a United States naturalization certificate.

Surely the issue is moot and the appeal not timely, after the oath of citizenship has been rendered, and a certificate of naturalization issued.

II. THERE IS NO CONFLICT OF DECISION BEFORE THE COURT.

The only conflict that exists is a continuous refusal of the appellant to accept the law as it is enacted and as it has been interpreted. The courts below have all properly interpreted *U. S. v. Menasche*[4] and have properly determined that Section 405 of the Immigration and Nationality Act of 1952 preserves status, rights and conditions that existed on the effective date of the aforesaid act without any limitation as to the time.[5]

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[3] **Tutun v. U. S.**, 270 U. S. 568 (1926); **Bindczyck v. Finucane**, 342 U. S. 76.

[4] **United States v. Menasche**, 348 U. S. 528 (1955)

[5] See **Petition of Rosenbaum**, 171 F. Supp. 141 (S. D. N. Y.), where the facts set forth are similar to the facts at bar. Petition filed in 1958, and the court determined that residence was sufficient to preserve status; **Petition of Zaharia**, 161 F. Supp. 314 (S. D. N. Y.); **In re Pinter's Petition**, 161 F. Supp. 337, 341 (N. D. Cal.); **Petition of Kauftail**, 152 F. Supp. 538 (S. D. N. Y.); **Petition of Pauschert**, 140 F. Supp. 485 (S. D. N. Y.); and **Aure v. United States**, 225 F. 2d 88 (C. A. 9)

III. ON THE MERITS, THE DECISION OF THE COURT BELOW IS CLEARLY CORRECT.

The court below correctly and clearly interpreted the leading case on this question. The court gave full cognizance and full authority to the language in *United States v. Menasche*, at page 536, where it was said: "It could be argued in the present case that it was Menasche's residence, rather than his filing of the declaration, which gave rise to his rights under Section 405(a). And this approach would have the virtue of eliminating the inequitable treatment envisaged by the Government as regards those special groups of aliens who did not have to file declarations as a prerequisite to citizenship." Here, like *Menasche*, *Wolff* was admitted to the United States for permanent residence prior to the effective date of the 1952 Act and had certain rights that were preserved and protected. The Supreme Court in its dictum did not use mere words but stated sound valid law of binding effect upon the courts below. The appellant now sets forth the unrealistic argument that while it is true that residence is a sufficient status to be preserved by the savings clause under the 1952 Act that there should be a cut-off date of December 24, 1957, and that by the respondent not filing his petition prior to that time, he is not eligible to file under the Act of 1940.

It is the duty of the courts to interpret the law. It is the duty of the legislature to enact the law. Nowhere under Section 405 of the Immigration and Nationality Act of 1952 does it state the length of time for which the right or status shall be preserved. It states that any status, condition or right in process . . . "unless otherwise specifically printed therein is hereby continued in force and effect." Congress, as stated in *Menasche*, did not intend to strip aliens of advantages given under prior acts but rather to preserve rights accruing in the prepetition stages of the naturalization process. If it was the intention of Congress to have

a cut-off date for said rights, this could have and should have been enacted in the statute. The court has previously determined that Naturalization Acts are permissive and that they do not require an alien to apply for citizenship within any prescribed time after he becomes qualified to do so.[6]

The appellant has also raised the issue as to whether the court below properly determined that the respondent would not have to file a new declaration of intention. The right to naturalize is a matter of substantive law. The question of a declaration of intention is a matter of procedural law.[7] Rights preserved continue under present day procedure and the courts do not require needless, antiquated steps to be taken. Thus, the court of appeals properly determined that the residence requirements of the respondent should be determined under the 1940 Act, and that his petition should be determined by the procedure in effect at the time of the filing of the petition for naturalization.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that a petition for a writ of certiorari be denied.

Respectfully submitted,

GEORGE GERSHENFELD,
Attorney for Respondent.

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[6] **Krausse v. United States,** 194 F. 2d 440 (2d Cir.)

[7] **In re Pinner's Petition,** 161 F. Supp. 337 (N. D. Cal.)

APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

In the Matter of GEORGE MAX CHARLES WOLFF PETITION FOR NATURALIZATION. } Petition No. 212562.

STIPULATION OF COUNSEL.

AND NOW, to wit: this 12th day of August, 1959, it is stipulated and agreed by and between GEORGE GERSHENFELD, attorney for petitioner, and HAROLD K. WOOD, United States Attorney for the Eastern District of Pennsylvania, and JAMES P. DORNBERGER, Assistant United States Attorney for the said District, as follows:

1. That the photostatic copy of the Certificate of Naturalization, attached to this Stipulation as Exhibit "A" and by reference made a part hereof, is a true, correct and certified copy of the duplicate original Certificate of Naturalization No. 8105882 issued to George Max Charles Wolff by the Clerk of the United States District Court for the Eastern District of Pennsylvania on January 16, 1959.

2. That the said photostatic copy of the duplicate original Certificate of Naturalization attached hereto as Exhibit "A" was prepared and issued contemporaneously with the origi-

nal Certificate of Naturalization issued to the petitioner and conforms to the original Certificate of Naturalization in all material respects.

3. That said photostatic copy of the duplicate original Certificate of Naturalization attached hereto as Exhibit "A" may be admitted into evidence in the above-captioned matter.

GEORGE GERSHENFELD,
Attorney for Petitioner.
HAROLD K. WOOD,
United States Attorney.
JAMES P. DORNBERGER,
Assistant United States Attorney.

UNITED STATES OF AMERICA.

DEPARTMENT OF JUSTICE.

IMMIGRATION AND NATURALIZATION SERVICE.

August 10, 1959

CERTIFICATION.

BY VIRTUE OF the authority vested in me by Title 8, Code of Federal Regulations, Part 103, a regulation issued by the Attorney General pursuant to Section 103 of the Immigration and Nationality Act,

I HEREBY CERTIFY that the annexed documents are originals, or copies thereof, from the records of the said Immigration and Naturalization Service, Department of Justice, relating to George Max Charles Wolff, File No. A-6,666,284, of which the Attorney General is the legal cus-

todian by virtue of Section 103 of the Immigration and Nationality Act.

In Witness Whereof I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service to be affixed, on the day and year first above written.

J. W. HOLLAND
District Director
Immigration and Naturalization Service
Philadelphia 6, Pa.

SEAL

Attached to preceding certification is,

Duplicate Original Certificate of Naturalization No. 8105882, Petition No. 212562, dated 16th day of January, nineteen hundred and fifty-nine (1959), signed by Gilbert W. Ludwig, Clerk of the U. S. District Court, by W. N. Prender, Deputy Clerk.